

**BEFORE THE TENNESSEE REGULATORY AUTHORITY  
NASHVILLE, TENNESSEE**

IN RE: PETITION OF US LEC  
TENNESSEE, INC. FOR DECLARATORY  
ORDER

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) DOCKET NO.  
TN REGULATORY AUTHORITY  
DOCKET ROOM

02-00890

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**PETITION FOR DECLARATORY ORDER**

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Pursuant to T.C.A. § 4-5-225 and T.R.A. Rule 1220-1-2-.05, US LEC of Tennessee, Inc. ("US LEC") petitions the Tennessee Regulatory Authority ("TRA") for a declaratory order as to the applicability of the TRA's rules and the tariffs of US LEC to the factual circumstances described below.

1. US LEC Corp., via its wholly owned subsidiaries is a telecommunications carrier operating in 14 states including Tennessee, where the operating subsidiary is US LEC of Tennessee, Inc. US LEC offers a variety of telecommunications services including local and long distance calling under the jurisdiction of the Tennessee Regulatory Authority and the Federal Communications Commission.

2. Pursuant to Chapter 408 of the Public Acts of 1995, T.C.A. §65-4-201(c), US LEC holds a certificate of convenience and necessity from the TRA to operate as a "competing telecommunications service provider" in Tennessee. In accordance with state law and the TRA's rules, the terms and conditions under which US LEC provides service in Tennessee are set forth in the carrier's tariffs which are on file at the Authority. Section 2.5.5 (E) of that tariff authorizes the company to discontinue service, without notice, to any customer

if the company reasonably believes that the service is being used for a fraudulent purpose. The tariff section states:

In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.

3. TRA Rule 1220-4-2-.12, "Reasons for Denying Service," states, "Service may be refused or discontinued for . . . non-compliance with the utility's rules on file with the Commission [now the Authority]." Therefore, pursuant to US LEC's tariffs and the rules of the Authority, US LEC has the right to terminate service, without notice, in the event of fraudulent use of the company's service.

4. US LEC has a contract to provide long distance telecommunications services, including international service, to Airstream Wireless Services, Inc., which is located in Memphis, Tennessee. The contract states, *inter alia*, "This Agreement and all US LEC services and agreements are governed by the terms and conditions contained in US LEC's tariffs and price lists (collectively, the "Tariffs") filed with federal and state regulatory agencies.... Customer agrees to be bound by the provisions of US LEC's Tariffs in effect from time to time."

5. The cost to US LEC of handling an international call varies substantially depending upon whether the call is made to a wireless telephone or to a non-wireless telephone (land line) telephone. The cost to US LEC of handling an international call made to a wireless telephone in some European countries is substantially more than the cost of handling a call made to a land line telephone in the same country. The reason for this rate imbalance is due, in part, to the fact that some European wireless carriers have unusually high termination charges which provide a substantial source of revenue for those carriers.

6. Based on normal calling patterns, approximately 10% of all long distance calls are made to wireless telephones. During negotiations with Airstream, Airstream represented to US LEC that no more than 10% to 15% of Airstream's international traffic would be made to wireless telephones. Based on US LEC's experience with normal traffic patterns and those representations of Airstream, US LEC agreed to accept and complete international calls for rates of \$.06 to \$.15 per minute depending on the country where the call terminates. Those rates are reflected in the contract between US LEC and Airstream.

7. US LEC began providing service to Airstream on June 10, 2002. To complete international calls, US LEC partners with a major international carrier which actually carries the call to Europe. On July 17, 2002, US LEC was contacted by the fraud division of that carrier and was informed by them of the unusual nature of the traffic coming from Airstream. Contrary to normal traffic patterns and the representation of Airstream, approximately 99.7% of all international calls coming from Airstream were being made to wireless telephones, mostly in Germany and in the United Kingdom. The majority of the calls lasted only thirty seconds.

8. Such an abnormal traffic pattern cannot be accidental. US LEC believes that someone is either (1) using a switch to separate calls made to wireless telephones from calls made to land line telephones and routing all wireless calls to US LEC or (2) using auto-dialers, or similar equipment, to dial repeatedly to wireless telephones simply in order to generate a large number of terminating minutes for the financial benefit of the terminating carrier. In either case, this abnormal traffic pattern is the result of deliberate manipulation and is likely being done for a fraudulent purpose.

9. Upon discovery of this manipulation of the traffic coming from Airstream, US LEC made a decision, based on the above-referenced section of US LEC's tariff, to terminate service to Airstream.

10. Before terminating service to Airstream, US LEC was losing approximately \$12,000 per day, representing the difference between the contract price and the significant costs incurred by US LEC to terminate this particular type of traffic.

11. After service was terminated, Airstream filed suit against US LEC in the Chancery Court of Shelby County, Tennessee. *Airstream Wireless Services v. US LEC of Tennessee, Inc.*, Docket No. CH-02-1441-3. On July 30, 2002, the day the suit was filed, Airstream obtained an *ex parte* temporary restraining order directing US LEC to resume service to Airstream. US LEC did not restore service but filed an "Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss." US LEC argued, *inter alia*, that the Tennessee Regulatory Authority, not the Court, has original jurisdiction over this dispute and that, based on US LEC's tariff and the TRA's rules, US LEC properly terminated service to Airstream. The temporary restraining order has now expired. Airstream is no longer asking for the resumption of service but is pursuing a suit for damages against US LEC for the discontinuance of service and has also asked the Court to hold US LEC in contempt for US LEC's failure to resume service when the temporary restraining order was issued. These matters are scheduled to be argued before the Court on August 27, 2002.

12. The TRA has jurisdiction over the subject matter of this dispute pursuant to T.C.A. § 65-4-117 (The Authority "has the power to investigate . . . any matter concerning any public utility.") and T.C.A. §65-5-210(a), *See BellSouth Advertising & Publishing Co. v.*

TRA, 2002 WL 1473208 (Tenn. 2002) (holding that the TRA "shall have original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested cases issues of fact and law arising as a result of the application of Acts 1995, ch. 408.") *See also, Breeden v. Southern Bell*, 285 S.W. 2d 346 (Tenn. 1955).

13. Airstream's lawsuit to the contrary, this is not a private contract dispute but a question of the proper interpretation and application of US LEC's tariffs and the rules of the TRA. Such matters are within the exclusive jurisdiction of the TRA. *See, Breeden and BellSouth, supra*, and *New River Lumber Co. v. Tenn. Railway Co.*, 238 S.W. 867 (Tenn. 1922). "No private agreement can replace a tariff's terms . . . [and] a tariff must be enforced unless the regulatory agency intervenes." *Metro East Center v. Quest Communications*, 294 F.3d 924 (7<sup>th</sup> Cir., 2002).

14. Based on these facts, US LEC asks that the TRA issue a declaratory order interpreting US LEC's tariff in light of these circumstances and declaring that US LEC properly terminated service to Airstream because of the apparent fraudulent use of US LEC's network.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

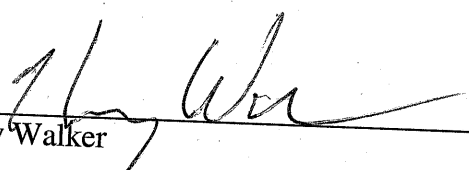
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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 23rd day of August, 2002.

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